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March 17, 2004

Honorable Deborah Taylor Tate
Chairman, Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re. *Triennial Review Order - 9 Month Proceeding - Switching*
Docket No 03-00491

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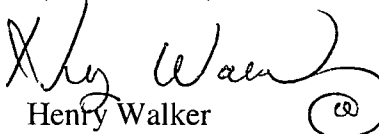
Dear Chairman Tate

Enclosed for filing is the original and 14 copies of the surrebuttal testimony and the proprietary exhibits of Joseph Gillan on behalf of CompSouth.

If you have any question, please contact me.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC


By: Henry Walker

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

IN RE:)	
)	Docket No. 03-00491
IMPLEMENTATION OF THE FEDERAL)	
COMMUNICATIONS COMMISSION'S)	Filed: March 1, 2004
TRIENNIAL REVIEW ORDER – 9 MONTH)	
PROCEEDING MASS MARKET SWITCHING)	

**SURREBUTTAL TESTIMONY AND EXHIBITS OF
JOSEPH GILLAN
ON BEHALF OF COMPSOUTH**

I. Introduction

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Q. Please state your name and the party you are representing.

A My name is Joseph Gillan I previously filed direct and rebuttal testimony on behalf of CompSouth in this proceeding.

Q. What is the purpose of your surrebuttal testimony?

A. The purpose of my surrebuttal testimony is to address BellSouth's claims in its rebuttal testimony that:

* The Tennessee Regulatory Authority (TRA) should ignore its own statutory objectives because *BellSouth* has concluded that the FCC would preempt Tennessee law (which should be sufficient to skip the step of actually asking the FCC to do so),

1 * The TRA has no authority to arbitrate pricing disputes under
2 section 271 of the Act, thereby freeing BellSouth to unilaterally
3 decide what rates CLECs should pay for the unbundled local
4 switching specifically listed in section 271's competitive checklist;
5 and,

6
7 * The FCC's "trigger" or "actual competition" test is disconnected
8 from all explanatory discussion in the TRO as to the factors that
9 the FCC intended the states consider to assure consistency between
10 the FCC's analysis and that of the states

11
12 BellSouth recently announced its earnings for 2003. Even with CLECs having
13 access to unbundled local switching, BellSouth is solidifying its dominance of the
14 mass market throughout the Southeast. In just over a year since it gained
15 approval to offer long distance service, it has achieved a 30% share of the mass
16 market (compared to UNE-P's regional share, for all CLECs combined, of 10%)

17
18 While there are number of complex issues being debated, the bottom line is that
19 BellSouth is asking this Authority to find, on the basis of the rapidly *shrinking*
20 analog loop activity of a handful of carriers that in total amounts to a roughly
21 0 5% share of the mass market, that CLECs are not impaired without access to
22 UNE-P This type of exaggerated reasoning, however, is exactly the type rejected
23 by the FCC in the TRO In effect, BellSouth is attempting to reverse the FCC's

1 impairment finding in Tennessee using data no different than that relied upon by
2 the FCC to find impairment in the first place.

3
4 **The Role of the TRA under State Law**

5
6 **Q. BellSouth suggests that the TRA should ignore Tennessee law in evaluating**
7 **the issues in this proceeding.¹ Do you agree?**

8
9 **A. No.** First, I note that BellSouth at least agrees that there is state law authority on
10 unbundling, adopted as part of a package of reforms that included removing
11 BellSouth from rate-of-return regulation. Although BellSouth acknowledges the
12 existence of the statute, it *suggests* – but never unambiguously states – that the
13 state law has been preempted by federal action through selective citation to the
14 TRO:

15
16 We find nothing in the language of section 251(d)(3) to limit its
17 application to state rulemaking actions. Therefore, we find that the
18 most reasonable interpretation of Congress' intent in enacting
19 sections 251 and 252 to be that state action, whether taken in the
20 course of a rulemaking or during the review of an interconnection
21 agreement, must be consistent with section 251 and must not
22 “substantially prevent” its implementation.... If a decision
23 pursuant to state law were to require the unbundling of a network
24 element for which the Commission has either found no impairment
25 – and thus has found that unbundling that element would conflict
26 with the limits in section 251(d)(2) – or otherwise declined to
27 require unbundling on a national basis, we believe it unlikely that

¹ Blake Rebuttal Testimony, pages 2 through 4

such decision would fail to conflict with and “substantially prevent” implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.²

Q. Has BellSouth cited the TRO correctly?

A. No. BellSouth left out the important third sentence in the cited passage that reads:

Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission.³

The omitted sentence that BellSouth did not want the TRA to consider is the one which establishes the process by which a claim of preemption should be tested. Significantly, the process does not direct state commissions generally to ignore state law or the policy choices made by the legislative branch. Rather, it sets forth a defined process whereby a specific state unbundling obligation may be challenged through a request for a declaratory ruling. BellSouth is well aware of this process that the FCC has set forth,⁴ a process that requires that BellSouth actually request preemption, not merely assert what the FCC would do if asked.

² Blake Rebuttal Testimony, page 3 (partially citing TRO ¶¶ 194-195)

³ TRO ¶ 195

⁴ See BellSouth Emergency Request for Declaratory Ruling, File No. 03-251, December 9, 2003

1

2 **Q. Do you believe that BellSouth's unbundling obligations under Tennessee law**
3 **would be found "inconsistent with" or "would substantially prevent**
4 **implementation of" the federal regime?**

5

6 A. No, not at all. Tennessee law may be used to require *more* of BellSouth than the
7 federal Act; but that would be, in part, because Tennessee law grants BellSouth
8 *additional* freedoms (the deregulation of its profits) that are not addressed by the
9 federal Act. The relationship between the unbundling obligations of Tennessee
10 law and the federal Act cannot be evaluated in isolation, these unbundling
11 provisions are part of a package of reforms that included the reduced regulation of
12 BellSouth. There is simply no basis to conclude that the FCC would (or could)
13 find that the balance of unbundling/deregulation in Tennessee law is inconsistent
14 with the federal Act, which may explain why BellSouth would rather suggest a
15 federal preemption than request one

16

17 **Q. Does the federal Act similarly scale unbundling obligations to the grant of**
18 **additional freedoms?**

19

20 A. Yes. Even under the federal Act, BellSouth is subject to varying layers of
21 unbundling obligations, recognizing that where additional benefits (to BellSouth)
22 or harms (to consumers) are possible, that additional unbundling obligations are
23 appropriate. For instance, as an incumbent local exchange carrier, BellSouth is

1 obligated to unbundle wherever an entrant would be “impaired” without access to
2 a network element (section 251). Moreover, BellSouth is subject to additional
3 unbundling obligations under section 271 of the Act in recognition of the special
4 threat that its interLATA entry holds.

5
6 These additional requirements [the unbundling obligations in the
7 competitive checklist] reflect Congress’ concern, repeatedly
8 recognized by the Commission and courts, with balancing the
9 BOCs’ entry into the long distance market with increased presence
10 of competitors in the local market ... The protection of the
11 interexchange market is reflected in the fact that section 271
12 primarily places in each BOC's hands the ability to determine if
13 and when it will enter the long distance market If the BOC is
14 unwilling to open its local telecommunications markets to
15 competition or apply for relief, the interexchange market remains
16 protected because the BOC will not receive section 271
17 authorization ⁵
18

19 Tennessee law embodies a similar approach – in exchange for additional
20 freedoms, BellSouth must comply with additional obligations. What is truly
21 remarkable about section 271 and Tennessee law, however, is that BellSouth has
22 managed to arrange for unbundling to be part of two *quid quo pros* – BellSouth
23 agreed to unbundle its network in exchange for deregulated profits (Tennessee),
24 and it agreed to unbundling once again in order to offer interLATA long distance
25 service (section 271). Having traded the same obligation twice, BellSouth has the
26 audacity to now suggest that its *quid* should be preempted, while its *quo* should
27 remain intact.

⁵ TRO ¶ 655

1

2 **Q. Has BellSouth's view of federal preemption recently been addressed by a**
3 **court?**

4

5 A. Yes. BellSouth appealed a decision by the Kentucky Public Service Commission
6 that prohibited BellSouth from refusing to provide DSL service to customers
7 obtaining voice service from a CLEC. (This is the same issue that BellSouth has
8 asked the FCC to address through a declaratory ruling). Certainly, the federal
9 district court did not agree with BellSouth's views on federal preemption.

10

11 It [the Kentucky Commission's requirement] establishes a
12 relatively modest interconnection-related condition for a local
13 exchange carrier so as to ameliorate a chilling effect on
14 competition for local telecommunications regulated by the
15 [Kentucky] Commission. The PSC order does not substantially
16 prevent implementation of federal statutory requirements and thus,
17 it is the Court's determination that there is no federal preemption.⁶

18

19 BellSouth may not presume state law preempt – or unilaterally declare the result –
20 if it believes a state law is inconsistent with the federal statute, it must ask the
21 FCC to agree before it may claim preemption.

22

⁶ Memorandum Opinion and Order, Civil Action No. 03-23-JMH, BellSouth
Telecommunications v. Cinergy Communications Company, United States District Court, Eastern
District of Kentucky, December 29, 2003

Section 271 Pricing

1
2
3 **Q. Ms. Blake opposes your recommendation that the TRA establish a**
4 **proceeding to address any section 271 pricing disputes.⁷ Do you agree with**
5 **his analysis?**

6
7 **A.** No There are two issues raised in connection with BellSouth's obligation to
8 continue to provide unbundled local switching under section 271's competitive
9 checklist The first concerns whether the TRA has the jurisdiction to establish the
10 "just and reasonable rate," which is the pricing standard adopted by the FCC. The
11 second issue concerns what the appropriate just and reasonable rate should be,
12 which requires that the TRA determine the process that will be used to establish
13 the rate.

14
15 **Q. Why does the TRA have the "first level" jurisdiction to arbitrate the just and**
16 **reasonable rate for unbundled local switching under section 271 of the**
17 **federal Act?**

18
19 **A.** Section 271 of the Act makes clear that the items listed in the competitive
20 checklist – including local switching – must be provided in one or more
21 interconnection agreements or through its statement of generally available terms

⁷ Blake Rebuttal, page 5

1 and conditions (SGAT),⁸ both of which are subject to state review and approval
2 under section 252 of the Act. Although the FCC has adopted a (potentially)⁹
3 different pricing standard for section 271 network elements, it has never excused
4 BellSouth from the arbitration procedure in section 252.

5
6 As the TRA is aware, there are a number of overlapping responsibilities in the
7 federal Act between the states and the FCC. For instance, the FCC has the
8 authority to review the UNE rates established by this TRA, to assure that those
9 rates comply with its TELRIC rules and section 271 (when those TELRIC rules
10 apply). This issue is no different. State commissions have the first responsibility
11 to *adjudicate* interconnection disputes by applying federal pricing rules – in this
12 instance, applying the just and reasonable standard – while the FCC may review
13 these same rates through an *enforcement* action (or initial section 271 application,
14 if relevant). Nowhere has the FCC changed this basic scheme – the mere fact that
15 the FCC recognized its continuing enforcement authority under section 271 did
16 not eliminate the states' arbitration authority under the Act.

17
18 **Q. Is it particularly important the BellSouth correctly price network elements**
19 **offered under Section 271 of the Act?**
20

⁸ §271(c)(2)(A) Agreement Required

⁹ As I explain below, the FCC's pricing standard for section 271 network elements (just and reasonable) includes, by statutory definition, the TELRIC-based rates established by the Commission

1 A Yes. As the FCC noted, BellSouth is subject to additional unbundling obligations
2 under section 271 of the Act in recognition of the special threat that its interLATA
3 entry holds.

4
5 These additional requirements [the unbundling obligations in the
6 competitive checklist] reflect Congress' concern, repeatedly
7 recognized by the Commission and courts, with balancing the
8 BOCs' entry into the long distance market with increased presence
9 of competitors in the local market.... The protection of the
10 interexchange market is reflected in the fact that section 271
11 primarily places in each BOC's hands the ability to determine if
12 and when it will enter the long distance market. If the BOC is
13 unwilling to open its local telecommunications markets to
14 competition or apply for relief, the interexchange market remains
15 protected because the BOC will not receive section 271
16 authorization.¹⁰

17
18 These protections would be meaningless if BellSouth could unilaterally establish
19 prices for section 271 network elements. Yet, this is what BellSouth seems to be
20 suggesting, by claiming that it has the right to set the rates:

21
22 As such, it is appropriate for BellSouth to set its rate according to
23 those market conditions through negotiation with the CLEC.¹¹

24
25
26 Exactly what negotiations is BellSouth referring to here? Under the federal Act,
27 CLECs have the right to have disputes arbitrated before state commissions where
28 negotiations fail. Yet here, BellSouth is opposing the TRA's involvement,

¹⁰ TRO ¶ 655

1 suggesting that BellSouth should “set the rate.” The issue has never been whether
2 BellSouth and the CLECs should try and negotiate (a triumph of hope over
3 experience), the relevant issue is only how should any dispute be resolved.
4

5 **Q. How are you recommending the TRA establish the section 271 just and**
6 **reasonable rate?**
7

8 A. I believe the TRA has two options First, the TRA can simply find here that the
9 TELRIC-based rate is also the just and reasonable rate under section 271 of the
10 Act. There is ample justification for this finding, including:
11

12 * The federal Act requires that TELRIC-based rates be just and
13 reasonable,¹² therefore, by definition, these rates are
14 unambiguously within the range of just and reasonable rates;
15

16 * BellSouth has admitted that TELRIC rules for switching are not
17 unreasonable, and are effectively the same as the TSLRIC cost
18 standard that it endorses; and
19

¹¹ Blake Rebuttal, page 5

¹² Section 252(d)(1)(A) states that “the just and reasonable rate for network elements shall be based on cost,” which the FCC has determined must be TELRIC

1 * The TELRIC-based rates for local switching in Tennessee exceed
2 BellSouth's "actual" embedded cost of switching.

3
4 Consequently, the evidence fully supports the TRA retaining the existing TELRIC-
5 based rates for local switching required to be unbundled under section 271 of the
6 Act. Alternatively, I recommend that the TRA clearly assert jurisdiction and
7 establish a proceeding to analyze the rate-level issue, with existing TELRIC-based
8 rates continuing in the interim

9
10 **Q. Why do you say that the TELRIC rules fairly compensate BellSouth for local**
11 **switching?**

12
13 A. First, and most importantly, the TELRIC pricing standard fully compensates
14 BellSouth at the forward looking average cost of switching. It is important to
15 understand that the issues that surround TELRIC pricing are loop-related, and do
16 not apply to switching. For instance, a heavy reliance on "actual network
17 topology" is already a feature of the TELRIC process for local switching because
18 the number of wire centers (and, therefore, the number and location of switches)
19 is fixed in the TELRIC model. Consequently, the "actual topology of the ILEC
20 network" is already considered in determining TELRIC switching costs and the
21 side-debate about the appropriateness of this aspect of TELRIC plays no role in
22 evaluating whether switching prices are reasonable.

1 **Q. Does BellSouth agree that TELRIC is an appropriate costing methodology**
2 **for switching?**

3
4 **A Yes. In South Carolina, BellSouth has testified to very same point I raised above**

5

6 It is important to note that even though the fundamental cost
7 methodologies (i.e., TSLRIC and TELRIC methodologies are
8 similar .. it is the additional constraints currently mandated by the
9 FCC that the incumbent local exchange carriers (ILECs) object to
10 with respect to TELRIC-based rates. The use of a hypothetical
11 network and most efficient, least-cost provider requirements have
12 distorted the TELRIC results and normally understate the true
13 forward-looking costs of the ILEC.

14

15 These distortions, however, are most evident in the calculation of
16 unbundled loop elements, and they are less evident in the
17 switching and transport network elements that make up switched
18 access.

19

20

21 . I emphasize that the main cost drivers for end office switching
22 are the fundamental unit investments, which are identical in
23 switching TSLRIC and TELRIC studies.¹³

24

25 Thus, BellSouth has acknowledged that its objections to TELRIC do not apply to
26 switching,¹⁴ that TELRIC and TSLRIC for switching are essentially the same and
27 that, for the main cost drivers, they are identical. Consequently, there is no reason

¹³ Direct Testimony on Robert McKnight on behalf of BellSouth, Public Service Commission of South Carolina (McKnight Direct), Docket No. 1977-239-C, filed December 31, 2003, pages 7 and 9.

¹⁴ This is not to say that BellSouth will not complain that the TRA has set switching rates incorrectly

1 to conclude that different just and reasonable rates are appropriate for section 271
2 switching network elements than for section 251 switching network elements
3

4 **Q. BellSouth claims that its unbundled local switching rate is subsidized.¹⁵ Is**
5 **there any evidence that this is the case?**
6

7 A. None First, as noted above, BellSouth agrees that TELRIC and TSLRIC for
8 switching are essentially identical and that, further, “[s]ince TSLRIC reflects all
9 of the direct costs, i e., both volume sensitive and volume insensitive costs,
10 TSLRIC studies are the basis for testing for cross subsidization.”¹⁶ Therefore,
11 TELRIC-based switching rates are not being subsidized. This conclusion is
12 consistent with the testimony of BellSouth’s economist, who testified in Florida:
13

14 Cross-subsidization is measured using forward-looking
15 incremental costs, not historical accounting costs. .. Even
16 reasonable allocations of fixed costs or common overhead costs to
17 a service have no role in a subsidy test .¹⁷
18

19 ***

20 The fact that TELRIC includes an allocation of shared fixed and
21 common costs means that the TELRIC-based UNE price would be
22 too high for a price floor.¹⁸

¹⁵ Blake Rebuttal, page 10

¹⁶ McKnight Direct, page 6

¹⁷ Rebuttal Testimony of William Taylor on behalf of BellSouth, Docket Nos 02-0119-TP and 020578-TP, filed November 25, 2002 (“Taylor Rebuttal”), page 18

¹⁸ Taylor Rebuttal, Page 6

Thus, even BellSouth agrees that TELRIC-based UNE rates for local switching are not being subsidized

Q. Have you also compared BellSouth's TELRIC-based local switching rates in Tennessee to its embedded cost?

A. Yes. Table 1 below compares BellSouth's average TELRIC-based local switching rate to an estimate of its direct "actual embedded" cost, as reflected in its ARMIS filings:

Table 1: BellSouth's Average Direct Embedded Switching Cost

Cost Category	2002 ARMIS	Per Line
Central Office Switching Expense	\$33,676	\$1.13
Estimated Switch-Related Depreciation ¹⁹	\$72,441	\$2.42
Average Embedded Cost		\$3.55
Average TELRIC Rate		\$4.03

As the table above shows, the TELRIC-based UNE rates (which BellSouth has agreed, at least in principle, are comparable to TSLRIC) are above the estimate of its direct embedded cost.²⁰ Under a variety of standards – TELRIC, TSLRIC and

¹⁹ ARMIS does not separately assign depreciation cost to switching. However, Telephone Plant in Service (TPIS) is separately reported for central office switching and the ratio of Switching TPIS to Total TPIS was used to estimate that portion of BellSouth's 2002 depreciation that can be allocated to switching.

²⁰ The average TELRIC revenue in Table 1 does not include revenues obtained from the CLEC for billing records, although the embedded cost category does include costs associated with recording call detail. As a result, a more precise comparison would likely show revenues exceeding costs by a larger amount than shown in the table.

1 embedded cost (which is offered here for completeness, not offered as an
2 appropriate costing approach) – the existing UNE rates for local switching are just
3 and reasonable. Consequently, although the FCC has modified the pricing
4 standard from a strictly TELRIC-based standard, to a potentially more liberal
5 “just and reasonable” standard, there is ample evidence that the existing rates are
6 justified under both.²¹

7
8 **Q. Should the TRA expect a wholesale market for unbundled local switching to**
9 **serve mass market customers?**

10
11 **A** No, certainly not in the near term. The fundamental predicate to a competitive
12 wholesale market is the ability for CLEC switches to access loops in a manner
13 that is economically equivalent to the manner available to BellSouth. BellSouth’s
14 switching is collocated with loop facilities and generally pre-wired to the outside
15 plant. As such, customers can be electronically migrated between BellSouth and
16 the CLEC (and back to BellSouth or to another CLEC) when wholesale switching
17 is leased from BellSouth. No external switch (that is, a CLEC-owned switch) has
18 this access to BellSouth’s loop facilities. These problems are systemic and, as a
19 practical matter, can only be corrected through a redesign of the local network

²¹ I remind the TRA that the Act itself defines the cost-based rates of section 252(d)(1), which the FCC requires satisfy its TELRIC-rules, are just and reasonable

1 that may not be warranted for analog POTS service in an era where most new
2 investment is likely to be packet-oriented ²²

3
4 **Q. BellSouth also opposes your proposal for a two-year quiet period, arguing**
5 **that you are attempting to extend UNE-P as long as possible.²³ How do you**
6 **respond?**

7
8 A. As my direct, rebuttal and surrebuttal testimony (above) makes clear, BellSouth is
9 obligated to provide UNE-P under section 271 of the Act indefinitely (or at least
10 until the FCC decides to forebear from holding BellSouth to its terms) and under
11 state law until the legislature changes the statute. The rationale for my
12 recommendation is not so much to extend the availability of UNE-P (which must
13 be offered in any event, at least for the foreseeable future), as much as it is to
14 reduce BellSouth's advantage from perpetual litigation. The FCC clearly gave the
15 states the latitude to establish filing windows to manage their resources – and the
16 resources of the industry – more effectively, and the TRA should do so here.

17

²² This would suggest that it may be wiser to *prevent* the same type of discriminatory access arrangements from emerging for packet-based services, than it is to devote resources to *fixing* those problems for analog-based services (which are largely fixed already through access to unbundled local switching). The task of creating an open packet-access network, however, is made more complicated by the FCC's decision to limit unbundling obligations for packet loops.

²³ Blake Rebuttal, page 6

1 **Q.** **Ms. Blake suggests that the TRA need not worry about removing local**
2 **switching in some exchanges, because “UNE-P itself will remain in place in**
3 **those markets where relief is not granted.”²⁴ Do you agree?**

5 A. No. Although Ms. Blake’s claim may be true in a “regulatory sense,” it is not
6 likely to be true in a real sense. The statewide competition that the TRA sees
7 today is the product of statewide UNE-P availability – in urban areas, in suburban
8 areas and in rural areas. This competition is linked – that is, the ability of carriers
9 to serve high cost rural areas is tied to their ability to compete in less costly urban
10 and suburban areas as well.

12 If the TRA makes the mistake of redlining any part of the state, the impact of that
13 decision is likely to extend beyond the redlined area to other parts of the state as
14 well. It is a mistake to think that the TRA can punch “holes” in the mass market
15 and expect it to operate efficiently.

17 *The TRO Does Not Compel Blindness*

19 **Q. Ms. Blake complains that the “de minimus” criteria outlined in your**
20 **testimony cannot be found in the TRO.²⁵ Do you agree?**

24 Blake Rebuttal, page 8

25 Blake Rebuttal, page 18

1

2 A No, not at all. The TRO is quite clear that the FCC expects the states were to
3 apply judgment in the same manner as the FCC: “To ensure that the states
4 implement their delegated authority in the same carefully targeted manner as our
5 federal determinations, we set forth in this Order federal guidelines to be applied
6 by the states in the execution of their authority pursuant to federal law.”²⁶ A
7 faithful application of the triggers should produce outcomes consistent with the
8 FCC’s own findings – that is, where a state commission observes facts that are
9 comparable to data that the FCC used to find impairment, then that *same* set of
10 facts cannot be abused in a “trigger analysis” to reverse that finding.

11

12 There is nothing in the TRO that suggests the FCC expected the states to apply
13 the trigger analysis in a manner that ignored its guidance, with the result being
14 states reversing the FCC’s national impairment finding by reviewing data no
15 different than the FCC considered. Rather, the FCC expected consistency
16 between its analysis and that of the states, with similar facts producing similar
17 results:

18

19 For example, we [the FCC] note that CMRS does not yet equal
20 traditional incumbent LEC services in its quality, its ability to
21 handle data traffic, its ubiquity, and its ability to provide
22 broadband services to the mass market. Thus, just as CMRS
23 deployment does not persuade us to reject our nationwide finding

²⁶ TRO ¶ 189

1 of impairment, at this time, we do not expect state commissions to
2 consider CMRS providers in their application of the triggers.²⁷
3

4 Moreover, in the same passage as above, the FCC directed the states to consider
5 its overall analysis, as outlined in Section V of the TRO (Principles of
6 Unbundling), as it looked into whether “intermodal providers” should be counted
7 as triggers:
8

9 As in the impairment triggers for high-capacity loops and
10 dedicated transport, states also shall consider carriers that provide
11 intermodal voice service using their own switch facilities
12 (including packet and soft switches) that meet the requirements of
13 these triggers and Part V above²⁸
14

15 Obviously, it makes no sense to insist that the states conduct a consistent analysis
16 when reviewing intermodal candidates, while sanctioning a completely
17 inconsistent approach when reviewing more conventional carriers. Rather, the
18 FCC was explicit:
19

20 As explained in detail below, we do establish ‘objective, carefully
21 defined criteria for determining where unbundling is (and is not)
22 appropriate.’ These criteria – including our triggers – ensure that
23 states undertake the tasks we give them consistently with the
24 statute’s substantive standards and stay within the parameters of
25 federally established guidelines²⁹
26

²⁷ TRO ¶ 499, n 1549, footnotes omitted, emphasis added

²⁸ Ibid

²⁹ TRO ¶ 428, footnotes omitted, emphasis added

1 **Q. Does BellSouth's claim that the triggers are satisfied in Tennessee comply**
2 **with this principle (i.e., that consistent facts should produce consistent**
3 **findings)?**

4
5 A No. It is useful to place BellSouth's fundamental claims regarding the level of
6 switch-trigger activity in perspective. Confidential Exhibit JPG-7 compares the
7 level of competitive activity as measured by BellSouth based on the number of
8 analog loops provided to each named trigger company.³⁰ Because BellSouth
9 cannot attribute all of its analog loops to individual carriers, I have computed each
10 carrier's share in two ways: (1) based on only those loops that BellSouth has
11 identified as being sold to the carrier, and (2) assuming that all of the loops that
12 BellSouth cannot attribute to any carrier are purchased by each claimed trigger.³¹
13
14 Two facts are clear from Exhibit JPG-78. First, no matter how one calculates the
15 mass market share of BellSouth's claimed trigger candidates – either looking at
16 only those loops BellSouth knows it provides these carriers, or by assigning to
17 each trigger all of the loops that BellSouth does not know who it sells to³² -- the

³⁰ Source: BellSouth Response to AT&T's 2nd Interrogatories, Item No. 115.

³¹ In other words, I have attributed all the unidentified loops to each company to determine its maximum possible UNE-L market share. Because this calculation assumes that each company purchases all unidentified loops, the market shares calculated in this way cannot be added without counting the unidentified loops multiple times.

³² Unfortunately, BellSouth has refused to provide the number of loops that Ms. Tipton claims each trigger candidate serves. Although BellSouth had been providing this data in response to discovery in other states, BellSouth has more recently been refusing to supply Ms. Tipton's summary information despite its clear relevance. BellSouth's attempt to mask the facts

activity is trivial (generally ranging from 0.0% to 0.3%), with the largest purchaser of analog loops explaining it is no longer pursuing the strategy.³³ The following summarizes the confidential information in Exhibit JPG-7.

Table 3: Known and Maximum Share of Trigger Candidates

Claimed Trigger Candidate	Known Share	Maximum Share ³⁴
CLEC A	0.1%	0.2%
CLEC B	0.0%	0.0%
CLEC C	0.0%	0.0%
CLEC D	0.0%	0.1%
CLEC E	0.0%	0.0%
CLEC F	0.0%	0.0%
CLEC G	0.3%	0.3%
CLEC H	0.0%	
Total Share of All Triggers	0.5%	

Second, the activity is in broad decline, whether viewed in the aggregate or by individual CLEC.³⁵ BellSouth's aggregate data shows that an unmistakable trend that analog UNE-L activity is insignificant and declining, as the facilities-based UNE-L strategy focuses on serving the enterprise market.

Table 4: Types of UNE Loops (VGE)

UNE-Loop Type	May 2002	Nov 2003	Change
Total Analog UNE Loops (Mass Market)	43,039	34,347	-20%
Total DS-1 UNE Loops (Enterprise)	108,096	204,456	89%

is precisely why the CLEC community fully supported state-conducted hearings – to assure that false claims could be tested through discovery and cross examination.

³³ See Affidavit from Xspedius (attached).

³⁴ Includes all unattributed analog loops in the share calculation for each claimed trigger.

³⁵ Table 3 on JPG-8 compares analog loop volumes for May 2002 and November 2003, which is the time period for which BellSouth provided data.

1 As Table 5 demonstrates, CLEC UNE-L activity is unquestionably directed
2 towards meeting the needs of enterprise customers (as the affidavits supplied here
3 and with my direct testimony demonstrate),³⁶ not the mass market. Confidential
4 Exhibit JPG-8 confirms this is the case, detailing the growth in enterprise loops
5 purchased by BellSouth's claimed trigger candidates.

6
7 **Q. Has the FCC repeatedly reject market activity on the level claimed by**
8 **BellSouth here as proving non-impairment?**

9
10 A. Yes. For example, consider the following claims of low-level competitive
11 activity that all ended with the FCC national finding of impairment for mass
12 market switching.

13
14 ..the record indicates that competitive LECs have self-deployed
15 few local circuit switches to serve the mass market. The BOCs
16 claim that, as of year-end 2001, approximately three million
17 residential lines were served via competitive LEC switches.
18 Others argue that this figure is significantly inflated. Even
19 accepting that figure, however, it represents only a small
20 percentage of the residential voice market. It amounts to less than
21 three percent of the 112 million residential voice lines served by
22 reporting incumbent LECs.³⁷

23
24 ***

25
26 We determine that, although the existence of intermodal switching
27 is a factor to consider in establishing our unbundling requirements,

³⁶ Attached to my surrebuttal testimony are additional affidavits provided by Xspedius and ICG

³⁷ TRO ¶ 438, footnotes omitted, emphasis added

1 current evidence of deployment does not presently warrant a
2 finding of no impairment with regard to local circuit switching. In
3 particular, we determine that the limited use of intermodal circuit
4 switching alternatives for the mass market is insufficient for us to
5 make a finding of no impairment in this market, especially since
6 these intermodal alternatives are not generally available to new
7 competitors.³⁸

8 ***

9
10
11 The Commission's *Local Competition Report* shows that only
12 about 2.6 million homes subscribe to cable telephony on a
13 nationwide basis, even though there are approximately 103.4
14 million households in the United States [2.6 percent]. Moreover,
15 the record indicates that circuit-switched cable telephony is only
16 available to about 9.6 percent of the total households in the nation
17 ... it is difficult to predict at what point cable telephony will be
18 deployed on a more widespread and ubiquitous basis.³⁹

19 ***

20
21
22 Current estimates are that only 1.7% of U.S. households rely on
23 other technologies to replace their traditional wireline voice
24 service.⁴⁰

25 ***

26
27
28 We also find that, despite evidence demonstrating that narrowband
29 local services are widely available through CMRS providers,
30 wireless is not yet a suitable substitute for local circuit switching.
31 In particular, only about three to five percent of CMRS subscribers
32 use their service as a replacement for primary fixed voice wireline
33 service, which indicates that wireless switches do not yet act
34 broadly as an intermodal replacement for traditional wireline
35 circuit switches.⁴¹

36

38 TRO ¶ 443, footnotes omitted, emphasis added

39 TRO ¶ 444, footnotes omitted, emphasis added

40 TRO ¶ 443, n 1356, emphasis added

41 TRO ¶ 445, footnotes omitted, emphasis added

1 The ILECs have already tried to use low levels of competitive activity as
2 marketplace evidence of non-impairment and the FCC's rejected those attempts
3 with a national finding of impairment. Obviously, it would be inconsistent for the
4 FCC to delegate to the states a trigger analysis that, when applied to data showing
5 the same *de minimus* levels of competitive activity reviewed and rejected by the
6 FCC, produced findings that reversed the FCC's national finding of impairment.

7
8 **Q. Dr. Aron claims that you are recommending that the TRA "ignore the plain**
9 **language" of the FCC's rules in your comments regarding the potential**
10 **deployment analysis.⁴² How do you respond?**

11
12 **A** Dr. Aron's exaggerates my testimony. The point that I was making is that the
13 TRA should approach with skepticism testimony (such as BellSouth's testimony
14 here) that claims that actual investors "got it wrong," while a incumbent-
15 sponsored model here about CLP profitability will "get it right." If BellSouth
16 used the BACE model to plan its entry out-of-region, then (at least in *those* states)
17 it may be a useful tool. But there is no reason to think it makes sense here.

18
19 I note, moreover, that Dr. Aron has not demonstrated any particular skill at
20 predicting, in real time, which CLP models would be most successful. In an

⁴² Aron Rebuttal, page 40

1 affidavit she filed in the Michigan 271 proceeding, Dr. Aron provided her
2 prediction of the market.

3
4 While some business models proved to be flawed and
5 unsustainable, a surprising variety are demonstrating to investors
6 their possibility for success, at least as an entry strategy. The
7 chronicles of the (so-far) successful CLECs prove interesting case
8 studies about the possibility of a variety of approaches to
9 competitive entry. Earlier I mentioned that four such CLECs are
10 McLeodUSA, Time Warner Telecom, Allegiance Telecom, Inc.,
11 and possibly XO Communications. Remarkably enough, each of
12 these CLECs exhibits a distinctly different entry strategy. One
13 firm, McLeodUSA, used and continues to use resale as an initial
14 entry method. Time Warner Telecom and XO Communications
15 use substantially their own self-provisioned networks, with Time
16 Warner focusing on larger business in the US, and XO on smaller
17 and medium-sized businesses in both domestic and Western
18 European markets. The success of these firms, which have been
19 called the “four horsemen” of the CLEC world, demonstrates that
20 each of the entry paths provided for by TA96 can be used
21 successfully by efficient firms.⁴³
22

23 The CLECs that Dr. Aron pointed to as the “model CLECs” just a few short years
24 ago, however, have been far less successful than Dr. Aron expected, with three of
25 the CLECs – XO, McLeod and Allegiance – all declaring bankruptcy. The only
26 CLP to not declare bankruptcy – Time Warner Telecom – does not compete in the
27 mass market, as even BellSouth agrees.⁴⁴
28

⁴³ Reply Affidavit of Dr. Debra Aron, on behalf of Ameritech Michigan, Case No. U-12320, July 30, 2001, page 12.

⁴⁴ BellSouth withdrew its claim that Time Warner was a self-provisioning mass market switch trigger in Florida, and never named them here in Tennessee.

1 At the end of the day, the TRA should weigh the relative merits of BellSouth's
2 basic claim – i.e., that UNE-L's inconsequential market share and its better-than-
3 any-investor model prove that CLECs are not impaired without access to
4 unbundled local switching – against the demonstrated market outcome of UNE-P
5 bringing competitive choice throughout the state and reach its findings
6 accordingly.

7
8 **Q. Does this conclude your surrebuttal testimony?**

9
10 **A Yes.**

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

In Re: Implementation of the Federal Communications Commission's Triennial Review Order (Nine-Month Proceeding) (Loop & Transport)

Docket No. 03-00527

AFFIDAVIT OF BERNARD ZUROFF

STATE OF COLORADO

COUNTY OF ARAPAHOE

1. My name is Bernard Zuroff. The facts contained herein are true and based upon my personal knowledge.
2. I am over the age of 21. I am not under any disability and I am fully competent to make this affidavit. I am employed as General Counsel and Secretary by ICG Telecom Group, Inc. ("ICG"). My business address is 161 Inverness Drive West, Inglewood, Colorado 80112.
3. I have been asked by parties to Docket No. 03-00527 to provide some basic information about ICG.
4. I understand that in pleadings filed in Docket No. 03-00527 that ICG has been named by BellSouth as a Self-Provider of analog POTS services using our own local circuits in Tennessee to serve mass market customers.
5. In preparation for filing this Affidavit, I have relied on certain definitions of terms included in the FCC's Triennial Review Order ("TRO"). The TRO defines enterprise customers as follows:
 - Are typically medium or large business customers with high demand for a variety of sophisticated telecommunications services that use loops with DS1 capacity and above; TRO ¶ 452
 - Are characterized by relatively intense, often data centric, demand for telecommunications services sufficient to justify service via high-capacity loops at the DS1 capacity and above; TRO ¶ 451
 - Purchase extensive local services resulting in significant revenues to the service provider, allowing a greater opportunity to recover any non-recurring costs associated with the 'set-up' of the loop and switch facilities necessary to provide service; TRO ¶ 452
 - Generate comparably greater revenues than residential customers sufficient to justify the sunk and fixed costs of installing the switch; TRO ¶ 452 and

- Are more willing to sign annual or term commitments. TRO ¶ 452
6. The TRO defines mass market customers as follows.
- Are residential and very small business customers; TRO ¶ 497
 - Do not require high bandwidth digital connectivity (i.e., DS1 and above) unlike enterprise customers; TRO ¶ 497
 - The accounts tend to be smaller, lower revenue accounts characterized by low margins and are often serviced on a month to month basis and not pursuant to annual contracts; TRO ¶ 459 and Note 1405
 - Are consumers of analog plain old telephone service or "POTS"; TRO ¶ 459
 - Purchase a limited number of POTS lines that can only economically be served via analog loops; TRO ¶ 497
 - Move freely from carrier to carrier which can cause a significant amount of churn; TRO ¶ 471 and
 - Have come to expect the ability to change local service providers in a seamless and rapid manner. TRO ¶ 467
7. Based on these definitions, ICG should not be considered a Self Provider of analog Plain Old telephone service ("POTS") to the mass market utilizing our switches in Tennessee. The principal business of ICG is to serve the enterprise and not the mass market in the areas in Tennessee where our switches are located. Today, ICG markets only to medium and large business enterprise customers with a high demand for a variety of sophisticated data-centric telecommunications services and solutions.
8. As an initial matter, the FCC has stated that the mass market is made up of residential and small business analog POTS customers. ICG does not actively market services to customers who desire to be served over analog DSO-level loops. ICG actively markets only to customers who plan to purchase digital service at capacities that justify the use of DS1-level loops. The number of voice lines needed by this type of customer often varies, but the customer's service needs are such that it wants to ensure sufficient capacity by purchasing service at a DS1 level.
9. Specifically, ICG currently serves 3470 voice grade equivalents (VGEs) in Tennessee. Yet ICG has only 208 DS-O lines operational on its Tennessee switches, just 6% of the total 3470 VGEs in the state. This does not begin to include all the other Internet and data services that ICG sells in the state of Tennessee. These DS-O customers are an incidental part of ICG's business. Serving these DS-O customers is not currently, and never has been a significant part of ICG's sales and marketing efforts.
10. ICG's emphasis on attracting business customers served at DS1 level or higher is reflected in the type of lines connected to our Tennessee switches.

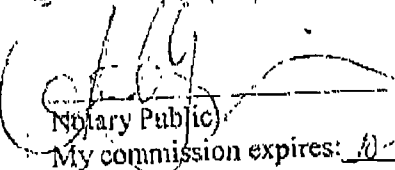
The chart below identifies for each switch in Tennessee, the number of voice grade equivalent ("VGE") lines attached to the switch and identifies whether those lines are DSO lines or DS1 and above lines.

Switch Name	Switch CLLI	Number of voice grade equivalent lines (VGE)	Of VGE lines, number of DSO Lines	Of VGE lines, number of DS1 & above lines
Nashville	NNSVLTNMWDS0	3,471	208	3262

11. Finally, ICG does not serve residential customers in Tennessee. Since ICG serves only businesses in all its service territories, the lines reflected on the chart above are business lines.

Further affiant sayeth not.

Sworn and subscribed to before me this 22nd day of March, 2004


(Notary Public)

My commission expires: 10-15-05

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

IMPLEMENTATION OF THE
 FEDERAL COMMUNICATIONS
 COMMISSION'S TRIENNIAL REVIEW
 ORDER - 9 MONTH PROCEEDING
 MASS MARKET SWITCHING

DOCKET NO.
03-00491

AFFIDAVIT

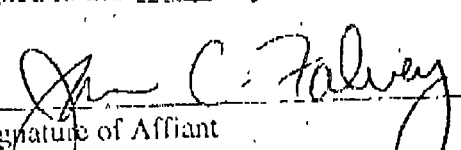
1, James C. Falvey depose and say as follows:

1. The facts contained herein are true and based upon my personal knowledge.
2. I am a citizen of Millersville, Maryland, where I have resided since 1996. I am 41 years of age. I am not under any disability and am fully competent to make this affidavit.
2. My name is James C. Falvey. I am employed as Senior Vice President of Regulatory Affairs by Xspedius Communications, LLC ("Xspedius"). My business address is 7125 Columbia Gateway Dr., Suite 200, Columbia, Maryland 21046.
3. I have been asked by CompSouth to provide some basic information about Xspedius.
4. It is my understanding that Xspedius has been named by BellSouth as a Self-Provider using our own local circuit switches in Tennessee to serve mass market customers.
5. I am familiar with the FCC definitions in the Triennial Review Order of "enterprise customers" and "mass market customers".
6. Based on these definitions, Xspedius should not be considered a Self Provider of analog Plain Old telephone Service ("POTS") to the mass market utilizing our switches in Tennessee. The principal business of Xspedius is to serve the enterprise and not the mass market in the areas in Tennessee where our switches are located. Today, Xspedius actively markets primarily to medium and large business enterprise customers with a high demand for a variety of sophisticated, data-centric telecommunications services and solutions.

7. As an initial matter, the FCC has stated that the mass market is made up of residential and small business analog POT's customers. While Xspedius does serve a very small number of small business customers utilizing DS 0 loops, Xspedius has only 158 residential voice grade equivalent lines in Tennessee.
8. Specifically, Xspedius currently serves 21,990 voice grade equivalents (VGEs) in the entire state of Tennessee. Of those, Xspedius has 7021 DS-0 facilities-based switched lines operational in Tennessee. These lines were turned up during an earlier period and Xspedius is no longer marketing at all to "mass market customers" in Tennessee. The existing DS 0 loops are left over from this prior marketing strategy. In addition, the above numbers do not include all the other Internet and data services that Xspedius sells in the state of Tennessee. These DS-0 customers are an incidental part of Xspedius' business in Tennessee. These 7021 lines are also a negligible percentage of the total number of total mass market customers in Tennessee, particularly when you consider that only 158 lines are for residential customers.
9. The small business customers are not "mass market customers" in the sense that they are not "lower revenue accounts characterized by low margins and serviced on a month to month basis and not pursuant to annual contracts". As discussed in Xspedius' marketing materials on its web site, Xspedius offers Complete Access, an integrated T-1 product designed for and marketed to sophisticated small and midsize companies with complex voice and data telecommunications needs. The Xspedius T-1 products are not designed for very small business customers and would not represent an efficient or affordable solution to the needs of very small business customers. Xspedius Complete Access is an "integrated T-1" service integrating local, long distance, and toll-free on a single T-1. It is sold with or without dedicated Internet service.
10. Xspedius utilizes an individualized contract with each customer. As a result, the lower revenues and "churn" experienced by carriers serving mass market customers tends not to be present with Xspedius' targeted customer segment.

Further affiant sayeth not,

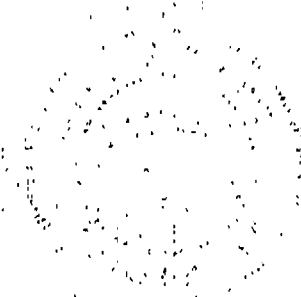
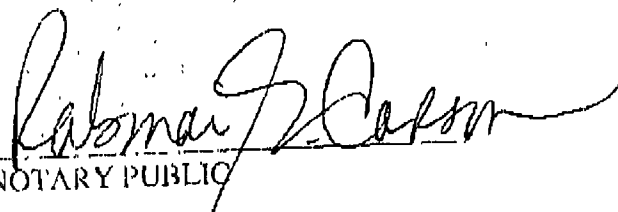
Signed to this 27th day of February, 2004.

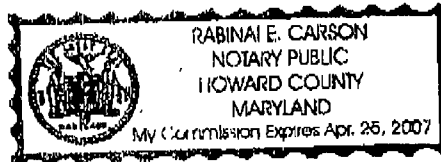

Signature of Affiant

James C. Fabrey
Print Name of Affiant

STATE OF MARYLANDCOUNTY OF HOWARD

In Columbia, on the 27th day of February, 2004, before me, a Notary Public in and for the above state and county, personally appeared James C. Falvey, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he or she executed said instrument for the purposes therein contained as his or her free and voluntary act and deed.



NOTARY PUBLIC



CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2004, a copy of the foregoing document was serviced on the parties of record, via US mail

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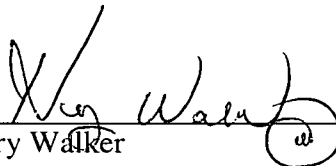
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